ABDUL KAHAR AHMAD & ORS v. JABATAN AGAMA ISLAM SELANGOR & ORS

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[JUDICIAL REVIEW NO: WA-25-375-12-2020]
6 AUGUST 2022

Abstract – *The jurisdiction to hear matters relating to invalidation of law under the constitutional and statutory judicial review does not lie within the Syariah courts. Judicial powers over the constitutional validity of laws could only be exercised by the civil Federal Judiciary.*

ADMINISTRATIVE LAW: *Judicial review – Jurisdiction – Detention under s. 23 of Syariah Criminal Procedure (State of Selangor) Enactment 2003 ('SCPE') – Matters relating to invalidation of s. 23 of SCPE and challenge against detention order on grounds of illegality, irrationality, improper procedure and disproportionality – Whether fell under constitutional and statutory judicial review – Whether civil court has jurisdiction to hear matter – Whether Syariah court have jurisdiction to hear matters relating to invalidation of law under constitutional juridical review*

ADMINISTRATIVE LAW: *Judicial review – Validity of legislation – Detention under s. 23 of Syariah Criminal Procedure (State of Selangor) Enactment 2003 ('SCPE') – Matters relating to invalidation of s. 23 of SCPE and challenge against detention order on grounds of illegality, irrationality, improper procedure and disproportionality – Whether timeless detention amounted to encroachment of fundamental liberty – Whether fundamental principle of presumption of innocence taken away – Whether imposition of bail and bond without being charged violated rights to livelihood and personal liberty – Whether order tainted with illegality, irrationality, improper procedure and disproportionality – Whether exercise of power under s. 23 of SCPE violated arts. 5 and 8 of Federal Constitution*

The applicants were arrested by the first to third respondents on suspicions that they had committed Syariah criminal offences. Thereafter, pursuant to the first to third respondents' application under s. 23 of the Syariah Criminal Procedure (State of Selangor) Enactment 2003 ('SCPE'), the Syariah Lower Court (2) Judge ('fourth respondent'), ordered the applicants to be released on bail on condition that they furnish bonds and guarantors, failing which, all the applicants would be detained ('fourth respondent's order'). When the applicants failed to comply with the fourth respondent's order, they were brought to their respective prisons to serve their detention together with the other inmates. They were subsequently released in stages and the period they were in detention ranged from one day to 99 days. However, no charges were preferred against any of the applicants. Subsequently, another Syariah Lower Court Judge ('sixth respondent') issued a new order altering the fourth

respondent's order ('sixth respondent's order') wherein, *inter alia*: (i) all the applicants were discharged not amounting to acquittal ('DNAA') on the third respondent's bail with one guarantor except for the first applicant where the first applicant needed to furnish two guarantors; and (ii) all the applicants above the age of 18 were ordered to report to the District Islamic Religion Office of their residency once a month. The previous order requiring the applicants under 18 years old to report to the District Islamic Religion Office was cancelled. Hence, the applicants' application for judicial review, contending summarily, that s. 23 of the SCPE is unconstitutional and the fourth respondent's order was tainted with illegality, irrationality, improper procedures and disproportionality and that the sixth respondent's order was irrational, improper and disproportionate. The respondents, on the other hand, contended that this court has no jurisdiction over the matter and that the criminal investigation by the first to third respondents and the powers of the fourth and sixth respondents could not be challenged by way of judicial review.

Held (allowing applicants' application with costs):

(1) The issues herein involved the invalidation of s. 23 SCPE being inconsistent with arts. 5 and 8 of the Federal Constitution ('FC'), natural justice and rules of law. Therefore, the matter fell under the category of constitutional judicial review. Since the fourth and sixth respondents' orders were also being challenged on grounds of illegality, irrationality, improper procedure and disproportionality, the instant matter would also fall under the category of statutory judicial review. In both instances, to wit, constitutional and statutory judicial review, this court has the jurisdiction to hear the matter. Syariah courts do not have the jurisdiction to hear matters relating to the invalidation of law under the constitutional judicial review and the challenge on the *Wednesbury* principle under the administrative law under O. 53 of the Rules of Court 2012. (paras 19 & 20)

(2) The fourth respondent's order had no particular time limit and was akin to a remand proceeding as the purpose was to give the investigation authority time to further investigate. There is no time limit expressed in the provision of s. 23 of the SCPE. Until and unless the applicants could satisfy the bond and bail conditions, they were to remain in detention. The timeless detentions of the applicants, more so, those who were detained from 15 to 99 days, were indeed an encroachment of the applicants' fundamental liberty. It was, therefore, clear that s. 23 of the SCPE and the fourth respondent's order made thereunder infringed the applicants' liberty and life when they were imposed with the conditions without being charged with any offence. (paras 23, 27 & 29)

(3) The applicants were also not afforded with the basic rights to be defended by a *Syarie* counsel/practitioner before the fourth respondent made the order which led to their detention. The fundamental principle of presumption of innocence was taken away by the provision of s. 23 of the SCPE. The applicants' liberty and livelihood must be the prime consideration especially when a few of the applicants were minors. As such, the fourth respondent's order was tainted with illegality, irrationality, improper procedure and disproportionality. (30 & 31)

(4) The bail and bonds can only be imposed when a charge was preferred against a person for the purpose of securing their attendance in court. However, based on 'borang jamin' made pursuant to s. 23 of the SCPE, at the time when the fourth respondent issued the condition of bond and bail on the applicants, the applicants were treated as accused persons because they had to furnish bail and bond for their attendance in court. The applicants had been punished not only before being charged and proven guilty, but even without a complete investigation. The exercise of powers under s. 23 of the SCPE clearly violated the applicants' rights to livelihood and personal liberty bestowed upon them by arts. 5 and 8 of the FC. (paras 28, 33 & 34)

(5) A DNAA can be pronounced if the judge finds the charge to be groundless under s. 96(g) of the SCPE. There was nothing before the sixth respondent to order DNAA against the applicants at the material time. Further, the imposition of conditions by the sixth respondent for the applicants to report themselves to the District Islamic Religion Office and that their bail was extended also infringed the applicants' fundamental liberty, irrational and unreasonable when there was an infinite investigation since their arrest and no charges were preferred against them as to date. (paras 39 & 40)

(6) As s. 23 of the SCPE was found unconstitutional for being inconsistent with the FC, against natural justice and rules of law, the orders handed down by the fourth and sixth respondents were illegal and unlawful. The applicants were entitled to be awarded damages for their wrongful detention. The applicants were each awarded RM10,000 as damages. (paras 41 & 43)

Case(s) referred to:

Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***

Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor [2021] 3 CLJ 465 FC ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***

SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener) [2022] 3 CLJ 339 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 117, 118
Federal Constitution, arts. 5, 8, 121(1), (1A)
Rules of Court 2012, O. 53
Syariah Criminal Offences (Selangor) Enactment 1995, s. 28
Syariah Criminal Procedure (State of Selangor) Enactment 2003, ss. 23, 96(g), 103

For the applicants - Ameerul Aizat Noor Haslan, Fahri Azzat, Iqbal Harith Liang & Muhammad Nur Aiman Toharudin (PDK); M/s Fahri & Co
For the 1st to 6th respondents - Nur Irmawatie Daud & Husna Abdul Halim; Assistant Legal Advisor, State of Selangor

Reported by S Barathi

JUDGMENT

Noorin Badaruddin J:

[1] On 14 April 2022, this court allowed the applicants' judicial review application partly and awarded damages of RM10,000 to each applicants to be borne by the first and fifth respondents.

[2] *Vide* the amended judicial review application (encl. 36), the applicants seek *inter alia* for the following reliefs:

(i) declaration that s. 23 of the Syariah Criminal Procedure (State of Selangor) Enactment 2003 ("SCPE") is null and void as it is inconsistent with arts. 5 and 8 of the Federal Constitution ("FC"), natural justice and rule of law;

(ii) declaration that the applicants were illegally detained;

(iii) *certiorari* order against the fourth and sixth respondents' order;

(iv) *certiorari* order against the Syariah criminal cases against the applicants;

(v) *mandamus* order to obtain the applicant's belongings;

(vi) damages against the respondents for illegal detention.

Facts

[3] The applicants were arrested by the first to third respondents on 20 September 2020 on the suspicions that they have committed syariah criminal offences and subsequently were brought to the first to third respondents' headquarters in Shah Alam.

[4] On the following day, the applicants were brought before the fourth respondent where the first to third respondents applied for the applicants to be bonded. The said application was made pursuant to s. 23 of the SCPE. The fourth respondent allowed the application and ordered the applicants to be released on bail on condition that they must furnish bonds and guarantors, failing which, all the applicants will be detained ("the fourth respondent's order").

[5] The applicants did not manage to comply with the fourth respondent's order due to the time constraint as it was already late in the evening. As a result, they were brought to their respective prisons *ie*, the Sungai Buloh prison for male adults, Pusat Koreksional Puncak Alam for kids, and women's prison in Kajang for female adults, to serve their detention together with the other inmates.

[6] Subsequently, the applicants were released by the prison authorities as follows:

Applicants	Detained On	Released On in Detention	Number Of Days
1st, 2nd and 4th	21.9.2020	22.9.2020	1
3rd and 14th	21.9.2020	24.9.2020	3
8th to 9th	21.9.2020	5.10.2020	15
7th	21.9.2020	9.12.2020	79
5th and 6th	21.9.2020	21.12.2020	92
10th to 13th	21.9.2020	28.12.2020	99

[7] No charges were preferred against any of the applicants as to date and the applicants were still reporting themselves to the District Islamic Religion Office.

[8] On 21 December 2020, the sixth respondent issued a new court order altering the fourth respondent's order ("the sixth respondent's order") in which it was ordered as follows:

(i) All the applicants are discharged not amounting to acquittal (dilepaskan tanpa bebas) on the third respondent's bail with one guarantor except for the first applicant where the first applicant needs to furnish two guarantors.

(ii) All the applicants who are above 18 years old are ordered to report to the District Islamic Religion Office of their residency once a month. The previous order that requires the applicants who are under 18 years old to report to the District Islamic Religion Office is cancelled.

(iii) That the bonds are refunded to the applicants and all the applicants' previous guarantors are released.

(iv) That this bail is extended until 22 June 2021.

[9] At the time this judicial review application was filed, the sixth respondent was not yet made a party.

[10] The leave application was subsequently heard on 5 April 2021 and adjourned for decision on 12 April 2021 whereby this court allowed the applicants' leave application for judicial review against the respondents. On

28 July 2021, this court allowed the applicants' application to add the sixth respondent as a party and to make few amendments in respect of the sixth respondent including some new facts.

Summary Of The Applicants' Contentions

[11] Summarily, it is the applicants' contention that:

(i) section 23 of the SCPE is unconstitutional and the fourth respondent's order is tainted with illegality, irrationality, improper procedures and disproportionality;

(ii) the sixth respondent's order is irrational, improper and disproportionate.

Summary Of The Respondents' Contentions

[12] Summarily, the respondents contend that:

(i) this court has no jurisdiction over the present matter;

(ii) the criminal investigation by the first to third respondents cannot be challenged by way of judicial review;

(iii) the fourth to sixth respondents' power cannot be challenged by way of judicial review.

Findings

[13] The crux of the matter herein relates to the detention of the applicants which is said to be unlawful and illegal. The applicants are not challenging the power of investigation or arrest by the first to third respondents. As such, the second ground of the respondents' contention need not be addressed.

[14] Further, it must also be made clear that the applicants are not challenging the competency of the State Government to legislate and as such the applicants need not file a petition to the Federal Court. The subject matter herein relates to the legality and/or constitutionality of s. 23 of the SCPE which is contended to be inconsistent with the FC, natural justice and rules of law. In the case of *Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor* [2021] 3 CLJ 465, the Federal Court in affirming and distinguishing inconsistency and incompetency challenge had stated:

> [28] The words used in arts. 4(3) and 128 (1) (a) of the FC are that there relevant Legislature (Federal or State) 'has no power' to make laws which is another way of saying that they are 'incompetent' to do so. Where a law is made incompetently it would be void and invalid and liable to be struck down under art. 4(1).
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> [29] In this regard, the phrases 'inconsistency challenge' and 'incompetency challenge' are purely convenient nomenclature serving as a means to identify the procedure to mount the different challenges given their nature. As identified earlier, **the High Courts have jurisdiction to**

A **hear inconsistency challenges while incompetency challenges are reserved for the original jurisdiction of the Federal Court**. The original jurisdiction of this court is exclusive simply because of the gravity of the allegation that the relevant Legislature has no power to make that law.

(emphasis added)

B **[15]** In *Iki Putra* (*supra*) the challenge mounted therein relates to the competency of the Selangor Legislative Assembly to enact s. 28 of the Syariah Criminal Offences (Selangor) Enactment 1995. However, in the instant matter, the challenge is against the consistency of s. 23 of the SCPE being *ultra vires* and inconsistent with arts. 5 and 8 of the FC, natural justice C and rules of law.

[16] Premised on the decision in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780, the issue as to the validity of a provision of the law can be determined by this court. In that case, the Federal Court stated:

D [57] *There are of course other grounds on which the validity of a law may be challenged. For instance, a law may be invalid because it is inconsistent with certain provision in the FC (art. 4(1)), or a State law may be invalid because it is inconsistent with a Federal law (art. 75). The court's power to declare a law invalid on any of these grounds 'is not subject to any restrictions, and may be exercised by any court in the land* and in any proceeding whether it be started by the Government E or by an individual.' (See: *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112 at p. 113)

(emphasis added)

[17] It is the respondents' contention that this court is not seized with the jurisdiction to hear the present matter as the reliefs sought by the applicants F are consequent to the powers exercised by the fourth and sixth respondents relating to Syariah offence and within the Syariah jurisdiction. Needless to say, the respondents are relying on art. 121(1) and (1A) of the FC, provisions of which clearly demarcate the civil and syariah legal system. The respondents further argued that the applicants should have filed review at the G Syariah High Court or filed a writ rather than a judicial review or should have filed a petition to the Federal Court to invalidate the law. It is of the considered view that the respondents' argument is untenable.

[18] Firstly, this issue was ventilated at the leave stage and this is an attempt to relitigate the same issue. Secondly, in *SIS Forum (Malaysia)* H *v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 CLJ 339 the Federal Court had stated that judicial review remains reposed solely in the civil courts. The court explained as follows:

[24] This court has consecutively and consistently held in its decisions in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* I [2017] 5 CLJ 526; [2017] 3 MLJ 561 ("*Semenyih Jaya*"); *Indira Gandhi Mutho*

v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145; [2018] 1 MLJ 545 (*Indira Gandhi*"); and *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1 ("*Alma Nudo*") that the *judicial power of the Federation remains reposed solely in the civil courts*.

[25] *A fundamental aspect of judicial power is judicial review. In this country, judicial review has two broad aspects. The first is constitutional judicial review and the second is statutory judicial review (also known as administrative judicial review)*. Both versions of it are primarily grounded on the concept of the doctrine of *ultra vires* – and this is explained further below.

Constitutional Judicial Review

[26] Granted that there is no specific legislative entry on the conferral of jurisdiction on judicial review, having regard to constitutional supremacy and the general power of supervision by way of constitutional judicial review, I opine that the jurisdiction for judicial review was intended to be conferred on the civil superior courts by way of the general empowering provision in cl. (1) of art. 4 of the FC and not by reference to the Legislative Lists in the Ninth Schedule.

[27] Constitutional judicial review is ingrained within cl. (1) of art 4 of the FC which stipulates that the FC being supreme, any law inconsistent with it is void to the extent of the inconsistency with the FC. Two things are corollary to this mighty declaration. *First, the civil Federal Judiciary is the only body capable of exercising review powers over the constitutional validity of laws as the final interpreter and independent protector of the FC. This is by virtue of cl. (1) of art. 121 of the FC which stipulates that judicial power resides in the two High Courts – essentially the superior courts established under Part IX of the FC*. This is the correct proposition of law whether pre-amendment or post-amendment of cl. (1) of art. 121.

[28] *The second corollary feature of cl. (1) of art. 4 and the power to constitutionally review the validity of legislation is the concomitant power to review Executive action*. This makes sense as it is usually, but not always, the exercise of Executive powers or discretions under written law that gives rise to constitutional litigation. *A successful attack on the validity of the impugned legislation might also invalidate, as a result, those Executive powers or discretions.*

Statutory Judicial Review

[35] While constitutional judicial review essentially concerns the invalidity of legislative and/or executive conduct to the extent that they are in excess of constitutionally permissible limits, *statutory judicial review encompasses all other forms of judicial review that are not constitutional judicial review. It covers a wide spectrum of actions which include but is not limited to actions challenging executive orders, decisions and/or discretions; the decisions of inferior tribunals for example the Industrial Court; whether any subsidiary legislation is invalid on the grounds that it is ultra vires the parent statute, and so on. The list is inexhaustive*.

[36] Again, *statutory judicial review* cannot be defined outright but can be discerned from its features. These features *include having a prayer for relief seeking any or ail of the remedies specified in para. 1 of the Schedule to the Courts*

A *of Judicature Act 1964 ("CJA 1964") premised on any of the usual grounds for judicial review to wit, illegality, procedural impropriety, irrationality or proportionality*.

[37] Statutory judicial review is different from constitutional judicial review because *statutory judicial review applications involve supervising and checking the exercise of public law powers without a prayer per se for the invalidation of any statutory provision*. A public law power may itself be a constitutional power but without any prayer for invalidation of the primary or parent Act, such an application would still be considered statutory judicial review.

[38] A recent example of this would be the decision of this court in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199; [2021] 5 MLJ 209. There, the Attorney General cum Public Prosecutor's discretion to charge an accused person under cl. (3) of art. 145 of the FC was challenged on the traditional grounds of judicial review highlighted earlier. Even though the power was sourced from the FC, I consider the challenge in that case a statutory judicial review.

[39] Thus, *the nature of the review whether constitutional or statutory is not determined by reference to the law claimed to have been breached. What matters in the ultimate assessment is the nature of the remedy sought*.

(emphasis added)

[19] Since the issue arising herein involves the invalidation of s. 23 of the SCPE being inconsistent with arts. 5 and 8 of the FC, natural justice and rules of law, the instant matter therefore falls under the category of constitutional judicial review. In addition, since the fourth and sixth respondents' orders are also being challenged on the ground of illegality, irrationality, improper procedure and disproportionality, the instant matter would also fall under the category of statutory judicial review where in both instances to wit, constitutional and statutory judicial review, this court has the jurisdiction to hear the matter. Ultimately, as stated by the Federal Court in *SIS (Forum) Malaysia* (*supra*), the nature of the review whether constitutional or statutory is not determined by reference to the law claimed to have been breached. What matters in the ultimate assessment is the nature of the remedy sought.

[20] Further, since this judicial review application is a challenge against the public authorities' powers, seeking for the invalidation of a provision in a statute, challenging the orders made by the fourth and sixth respondents based on the principle of administrative law and for the prerogative writ of *certiorari* and *mandamus* to be issued, a writ action cannot be the proper mode as the facts of the matter are not disputed. It is also clear that Syariah Courts do not have the jurisdiction to hear matters relating to the invalidation of law under the constitutional judicial review and the challenge on the *Wednesbury* principle under the administrative law under O. 53 Rules of Court 2012. Therefore, art. 121(1A) of the FC is inapplicable and irrelevant herein. In *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145 the Federal Court had stated:

[87] The operation of art. 121(1A) in practice illustrates this proposition. *Clause (1A) does not remove the jurisdiction of civil courts where constitutional interpretation is concerned*. Per Abdul Hamid Mohamed FCJ in *Latifah* (*supra*): A

> *"Interpretation of the Federal Constitution is a matter for this court, not the syariah Court*." This is the case even where the determination of Islamic law is required for the purpose of such interpretation, as firmly reiterated by the Federal Court in *Abdul Kahar Ahmad v. Kerajaan Negeri Selangor Darul Ehsan; Kerajaan Malaysia & Anor (Interveners)* [2008] 4 CLJ 309; [2008] 2 MLJ 617: B
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> > *Nowhere in the Constitution does it say that interpretation of the Constitution, Federal or State is a matter within the jurisdiction of the Syariah Court to do. The jurisdiction of Syariah Courts are confined to the limited matters enumerated in the State List and enacted by the respective state enactments ...* C
> >
> > Nowhere in the Constitution is there a provision that the determination by Islamic law for the purpose of interpreting the Federal Constitution is a matter for the State Legislature to make law to grant such jurisdiction to the Syariah Court. Hence, *there is no such provision in the State Enactments to grant such jurisdiction to Syariah Courts. In fact, it cannot be done*. D

[88] In *Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557; [2007] 4 MLJ 585, Richard Malanjum Chief Judge Sabah and Sarawak expressed a similar view in his dissenting judgment: E

> *Since constitutional issues are involved especially on the question of fundamental rights as enshrined in the Constitution it is of critical importance that the civil superior courts should not decline jurisdiction by merely citing art. 121(1A)*. In my view the said article only protects the Syariah Court in matters within their jurisdiction which does not include the interpretation of the provisions of the Constitution. *Hence when jurisdictional issues arise civil courts are not required to abdicate their constitutional function*. F

[89] *Clause (1A) also does not remove the jurisdiction of civil courts in the interpretation of legislation. This is the case even in relation to legislation enacted for the administration of Muslim law*, as was held in *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77; [1992] 1 MLJ 1: G

> The new cl. 1A of art. 121 of the Constitution effective from 10 June 1988 has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah Courts. *But that clause does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of muslim law* ... If there are clear provisions in the State Enactment the task of the civil court is made easier when it is asked to make a declaration relating to the status of a person whether such person is or is not a Muslim under the Enactment. H I
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> (emphasis added)

A **Section 23 Of The SCPE And The Fourth And Sixth Respondent's Order**

[21] Section 23 of the SCPE states:

> Release of persons arrested
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> 23. No person who has been arrested by a Religious Enforcement Officer
B or police officer under this Enactment shall be released except on bond and bail or under the order in writing of a Judge or Chief Religious Enforcement Officer or of a police officer not below the rank of Inspector.

[22] This court has examined the context of s. 23 of the SCPE relied upon by fourth respondent in making the impugned order.

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[23] Firstly, the fourth respondent's order is akin to a remand proceeding as the purpose is to give the investigation authority time to further investigate. The fourth respondent's order has no particular time limit but instead it enlarged the time for the first to third respondents to further investigate.

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[24] Secondly, s. 23 of the SCPE allows the fourth respondent to impose conditions (bond & bail) against the applicants and each applicant was imposed with different conditions (bond & bail). So, whilst the first to third respondents were given time to further investigate, the applicants on the other hand were bound to comply with the conditions (bond & bail) in order
E for them to be released.

[25] Thirdly, s. 23 of the SCPE is not only akin to a remand proceeding but also can be seen as a 'disguise to bail proceedings' except for the fact that in civil bail proceedings, the judge can only impose conditions of bail &
F bonds after a criminal charge(s) is levelled against an accused which is not the case herein.

[26] Fourthly, whilst some of the applicants were financially capable of complying with the conditions of the bond & bail, the other applicants who were not, were detained up to 99 days in prison. Importantly, due to the
G fourth respondent's order, the applicants were detained without any charges preferred against them whilst the investigation was still going on indefinitely. The detention period of the applicants is tabulated below:

Applicants	Detained On	Released On in Detention	Number Of Days
1st, 2nd and 4th	21.9.2020	22.9.2020	1
3rd and 14th	21.9.2020	24.9.2020	3
8th to 9th	21.9.2020	5.10.2020	15
7th	21.9.2020	9.12.2020	79
5th and 6th	21.9.2020	21.12.2020	92
10th to 13th	21.9.2020	28.12.2020	99

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[27] It can easily be comprehended and as stated earlier, that the purpose of the fourth respondent's order is to give time to the first to third respondents to further investigate the Syariah offence said to have been committed by the applicants and this cannot be disputed to be similar to a remand proceeding in the civil court. In the civil remand proceedings under s. 117 of the Criminal Procedure Code ("CPC"), there is the 14 days maximum time limit to remand persons who are suspected of committing crime. However, there is no time limit expressed in the provision of s. 23 of the SCPE. Until and unless, the applicants can satisfy the bond & bail conditions, they are to remain in detention, it is therefore clear that s. 23 of the SCPE and the fourth respondent's order made thereunder infringed the applicants' liberty and life when they were imposed with the conditions (bond & bail) without being charged with any offence.

[28] In fact, as at the time the present matter is heard, no charges were preferred against them. As such, the proceedings held before the fourth respondent could not be tantamount to a bail proceeding. It is trite that bail and bonds can only be imposed when a charge is preferred against a person for the purpose of securing their attendance in court.

[29] Section 23 of the SCPE is clearly inconsistent with the rights guaranteed under the FC when it allows the fourth respondent to impose conditions (bond & bail) against the applicants when they were all still being investigated. Moreover, the provision is also unconstitutional as it allows imposition of timeless and infinite remand or detention period on the applicants if they were to fail to come up with the bail and bond. This, transgress the very core of the fundamental liberty which is safely guarded and deeply embedded in the FC. Even in the civil remand proceedings there is the maximum 14 days of remand normally applies to persons who are being investigated with serious offences like murder. The provision of s. 23 of the SCPE gives the impression that the Syariah offences are much more serious than murder. The timeless detentions of the applicants herein more so those who were detained up from 15 to 99 days are indeed an encroachment of the applicants' fundamental liberty. They are in fact sentenced without any criminal charge levelled against them and bereft of a trial to defend themselves. It is as though they have been punished without trial.

[30] The applicants were also not afforded with the basic rights to be defended by a *syarie* counsel/practitioner before the fourth respondent made the order which led to their detention in the respective prisons.

[31] The fundamental principle of presumption of innocence has long been recognised at common law. It is a principle that lies at the very heart of criminal law which cannot be different from the Syariah criminal law and it is of the considered view that this well-entrenched principle is taken away

by the provision of s. 23 of the SCPE. As such, the fourth respondent's order is tainted with illegality, irrationality, improper procedure and disproportionate. The applicants' liberty and livelihood must be the prime consideration especially when a few of the applicants herein are minors. The fourth respondent orders were unnecessary, irrational and unreasonable.

[32] It is perplexing when one is to see the bail forms or "borang jamin" made under s. 23 of the SCPE issued by the Syariah Courts to the applicants where it is clearly stated for three times that the applicants have been charged in court. The "Borang Jamin" made pursuant to s. 23 of the SCPE *inter alia* states as follows:

> Bahawa saya (nama) ... No K/P: ... yang tinggal di ... **yang telah kena tuduh dengan kesalahan** adalah dengan ini mengaku akan hadir di hadapan Mahkamah Syariah di ... pada jam ... pada ... haribulan ... (atau pun pada masa dan haribulan lain yang diberitahu oleh Ketua Pegawai Penguatkuasaan Agama) kerana menjawab tuduhan ini; jika sekiranya saya tiada hadir sebagaimana yang tersebut maka saya mengaku akan membayar kepada Kerajaan Negeri Selangor wang sebanyak Ringgit Malaysia ...
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> Bertarikh ... haribulan ... tahun 2020
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> Nombor resit:
>
> ...
> (**Tandatangan yang kena tuduh**)
>
> Saya (nama) ... No. K/P yang tinggal di ... yang sesungguhnya menjamin bahawa **orang kena tuduh tersebut** nama dan kesalahannya di atas akan hadir di hadapan Mahkamah Syariah dan/atau tempat yang tersebut di atas pada jam dan hari yang tersebut di atas kerana menjawab tuduhan yang akan di kenakan kepadanya; jika sekiranya dia tiada hadir sebagaimana yang tersebut maka saya jamin akan membayar kepada Kerajaan Negeri Selangor wang sebanyak Ringgit Malaysia.
>
> (emphasis added)

[33] Looking at the "borang jamin" made pursuant to s. 23 of the SCPE, it can be gleaned that at the time when the fourth respondent issued the condition of (bond & bail) on the applicants, the applicants were treated as accused persons because they have to furnish bail & bond for their attendance in court. Question is, why were the applicants treated and stated to be accused persons when there are no charges preferred against them and where if they fail to pay the bail & bonds, they have to be detained?

[34] The provision of s. 23 of the SCPE is against art. 5 of the FC. It allows and gives the Syariah Courts the powers to impose the bail & bond and when the persons arrested such as the applicants were unable to furnish the bail & bond they have to be detained in prison. In this instant matter, two of the applicants were detained for 99 days. This is until they are charged. If no

charges are preferred against them, do they have to be detained indefinitely if they cannot come up with the bail & bond? It cannot be refuted that the applicants have been punished not only before being charged and proven guilty, but they have been punished without a complete investigation. The exercise of power under s. 23 of the SCPE clearly violates the applicants' rights to livelihood and personal liberty bestowed upon them by arts. 5 and 8 of the FC.

[35] The fourth respondent's order made under s. 23 of the SCPE is tainted with illegality, irrationality, improper procedure and disproportionate because firstly, there is no express provision to detain the applicants if they are not able to furnish bail/bond. Secondly, it is irrational to detain the applicants when there are no charges preferred against them. Thirdly, the fourth respondent's order is irrational because there is no time limit/period to detain the applicants. Fourthly, s. 23 of the SCPE is improper because it is a facade to bail proceeding when there is no legal representation during the hearing. Fifthly, s. 23 of the SCPE is an improper procedure because it turns out to be a form of punishment without charges framed or preferred against the applicants. Sixthly, s. 23 of the SCPE is irrational because it runs contrary to the fundamental liberty and livelihood of persons arrested like the applicants when detained. Lastly, the fourth respondent's order is irrational as it contradict with the "borang jamin" made pursuant to s. 23 of the SCPE.

[36] The respondents attempted to rely on s. 118 of the CPC to justify the fourth respondent's order in imposing the bail & bond under s. 23 of the SCPE pending investigation. The reliance on s. 118 of the CPC to justify s. 23 of the SCPE and/or the fourth respondent's order is misplaced. Section 118 of the CPC states:

> Police officer may require bond for appearance of complainant and witnesses
>
> 118. (1) If upon a police investigation made under this Chapter it appears to the officer making the investigation that there is sufficient evidence or reasonable ground of suspicion to justify the commencement or continuance of criminal proceedings against any person, the officer shall require the complainant, if any, and so many of the persons who appear to the officer to be acquainted with the circumstances of the case, as he thinks necessary, to execute a bond to appear before a Magistrate's Court therein named and give evidence in the matter of the charge against the accused.
>
> (2) The officer in whose presence the bond is executed shall send it to the Magistrate's Court.
>
> (3) If any complainant or witness refuses to execute the bond, that officer shall report the same to the Magistrate's Court which may then in its discretion issue a warrant or summons to secure the attendance of the complainant or witness before itself to give evidence in the matter of the charge against the accused.

[37] It is very clear that s. 118 of the CPC provides for bond (not bail in the form of money) to be executed by the police for the purpose of appearance of complainant and witnesses (not person arrested as in the instant matter) to appear in court to give evidence. Further, it must be emphasised that there is no detention under s. 118 of the CPC unlike s. 23 of the SCPE when the person arrested will be detained until they come up with the bail.

[38] It becomes more perplexing when it comes to the sixth respondent's order. The sixth respondent's order *inter alia* states:

> 1. **Mahkamah memerintahkan Responden-Responden dilepaskan tanpa bebas** dengan jaminan Ketua Penguatkuasa Agama Negeri Selangor dengan syarat seorang penjamin berusia 21 tahun ke atas, warganegara Malaysia dan bermastautin di Negeri Selangor kecuali Responden 1 (Abdul Kahar bin Ahmad) dengan dua orang penjamin berusia 21 tahun ke atas, warganegara Malaysia dan bermastautin di Negeri Selangor.
>
> 2. Mahkamah memerintahkan Perintah bertarikh 27 Oktober 2020 untuk melaporkan diri di Penguatkuasaan JAIS di Pejabat Agama Islam Daerah bagi Responden-Responden yang berumur 18 tahun ke bawah adalah dibatalkan. Manakala bagi Responden-Responden yang berumur 18 tahun ke atas, Mahkamah memerintahkan Responden-Responden melaporkan diri di Penguatkuasaan Jabatan Agama Islam Negeri Selangor di Pejabat Agama Islam Daerah permastautinan masing-masing satu kali sebulan.
>
> 3. Mahkamah memerintahkan bon Jamin dikembalikan kepada Responden-Responden dan penjamin-penjamin sebelum ini dilepaskan.
>
> 4. Mahkamah memerintahkan jaminan ini dilanjutkan sehingga tarikh 22 Jun 2021.
>
> (emphasis added)

[39] It is of the considered view that there is no legal basis for the sixth respondent's order. The sixth respondent's order is irrational and illegal as the order to discharge not amounting to acquittal (DNAA) is given without any criminal charge being made in the first place. The question is, what are the applicants discharged but not acquitted from? The power given for the Syariah Court to DNAA is provided under s. 103 of the SCPE when the *syarie* prosecutor declines to prosecute an accused already charged with an offence. A DNAA can be pronounced if the judge finds the charge to be groundless under s. 96(g) of the SCPE. So, there is nothing before the sixth respondent then to DNAA the applicants at the material time.

[40] The imposition of conditions by the sixth respondent for the applicants to report themselves to the District Islamic Religion Office and that their bail was extended to 22 June 2021 also infringed the applicants' fundamental liberty, irrational and unreasonable when there is an infinite investigation since 2020 and no charges are preferred against them as to date.

The sixth respondent's order is tainted with illegality, irrationality, improper procedure and disproportionate when the applicants were bound by the imposition of the bails & bonds to attend the 22 June 2021 mention date (not trial).

[41] It is of the considered view that s. 23 of the SCPE is unconstitutional for being inconsistent with the Federal Constitution, against natural justice and rules of law. The order handed down by the fourth and sixth respondents are illegal and unlawful. Both the fourth respondent's and sixth respondents' orders are therefore, quashed.

[42] Having found the above, this court is of the considered view that the fourth and the sixth respondents are not to be made liable for the wrongful detention of the applicants. Although they do not file any affidavit to state that they have issued the order in good faith, *etc*. This court is of the considered view that as judicial officers, they are deemed to have discharged their functions in good faith and in accordance with law notwithstanding the findings of the law being illegal/unconstitutional.

[43] This court finds that the applicants are entitled to be awarded with damages for their wrongful detention. This court awards the applicants RM10,000 each as damages which are to be borne by the first and fifth respondents.

Conclusion

[44] Premised on the above, the applicants' application was therefore allowed (partly) with costs.